

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT FOR THE  
WESTERNDISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,  
  
Plaintiff  
  
v.  
  
ROMAN VALERYEVICH SELEZNEV  
  
Defendant.

NO. CR11-0070RAJ

**RESPONSE TO DEFENDANT'S  
MOTION TO PROHIBIT REVIEW OF  
MONITORED PHONE CALLS**

Noting Date: October 16, 2015

**I. INTRODUCTION**

Like every other detainee at FDC SeaTac, defendant Roman Seleznev's non-legal telephone calls are subject to monitoring. All inmates in pretrial detention are subject to the same level of monitoring, and the U.S. Attorney's office routinely obtains and reviews these communications.

Defendant is acutely aware of this fact. All of defendant's calls are placed from telephones labeled with signs indicating that "all conversations on this telephone are subject to monitoring."<sup>1</sup> The sign further instructs the inmates that if they wish to place unmonitored calls to their attorney, they may contact their unit supervisor. When placing a call on these monitored telephones, a recording frequently reminds the caller that the

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<sup>1</sup> Although defendant is a native Russian speaker, he has demonstrated an ability to read and write English.

1 call is being monitored. Further, as discussed herein, it is obvious from the calls  
2 themselves that defendant knows the calls are being monitored and reviewed. On  
3 numerous occasions, defendant and his father have specifically discussed the fact that  
4 their calls are monitored. Further, the recorded conversations include frequent attempts  
5 to obfuscate the meaning of their communications by speaking in code, by whispering to  
6 avoid the recording of their statements, and by speaking in quick, clipped sentences to  
7 further evade the monitoring of their communications. It is also evident from the calls  
8 that defendant has a clear understanding of the attorney-client privilege.

9 FDC's monitoring of these calls, and the prosecution team's review of them, serve  
10 important safety and law enforcement purpose. As discussed below, despite knowing  
11 that the calls are being monitored, defendant and his father have discussed plans to  
12 tamper with, or possibly harm, witnesses, to manipulate defendant's conditions of  
13 confinement, and to delay the trial. Indeed, the content of defendant's communications  
14 with his father prompted the FDC staff to alert the U.S. Attorney's Office and the U.S.  
15 Marshals of its concerns about the safety and security of the institution and the  
16 community.

17 There is no legal basis for defendant's motion. The Ninth Circuit has upheld as  
18 proper the review by prosecution teams of monitored calls. The law is clear that  
19 defendant has no reasonable expectation of privacy in his monitored communications,  
20 and no recognized privilege applies to his communications with his friends and family  
21 members. The Court should deny defendant's request that he be treated differently from  
22 every other detainee at SeaTac.

## 23 **II. BACKGROUND**

### 24 **A. FDC's Monitoring of Defendant's Calls**

25 Since defendant was provided with telephone privileges at the FDC in  
26 approximately September 2014, the BOP has been conducting routine monitoring of  
27 defendant's telephone calls with friends and family. Because defendant primarily speaks  
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1 Russian during his telephone conversations, recordings of the conversations have been  
2 translated by BOP contractors. Each call is reviewed by BOP staff. Translations of  
3 defendant's telephone calls with his father have revealed numerous attempts to obfuscate  
4 the meaning of their conversations to evade BOP monitoring.

5 Despite defendant and his father's attempts to speak in code, the calls suggest  
6 defendant and his father are attempting to identify undisclosed witnesses and may be  
7 planning to tamper with prospective witnesses. Other conversations between defendant  
8 and his father include references to attempts to exaggerate defendant's medical  
9 impairments to force the BOP to transport defendant outside of the FDC for a medical  
10 appointment. Finally, as shown in the government's response to defendant's Motion to  
11 Bifurcate Representation, monitoring of defendant's phone calls have also revealed  
12 efforts to fabricate break downs in communications with counsel to justify delaying these  
13 proceedings.

14 **B. Defendant and His Father Are Aware of the FDC Phone Monitoring.**

15 Defendant and his father have repeatedly expressed a clear understanding of the  
16 fact that their communications are being monitored and that attorney-client privilege does  
17 not protect the conversations. For example, as early as October 3, 2014, a little over two  
18 weeks after defendant began using the FDC phones, defendant's father told him "I know  
19 that they are listening in and that people who are listening in do not wish you well."

20 Throughout the time defendant has been in custody and talking to his father on the  
21 monitored telephones at the FDC, defendant and his father have repeatedly warned each  
22 other about the monitoring of their communications with comments such as: "let's don't  
23 talk about it over the phone;" "I don't want to talk about it on the phone considering that .  
24 . . .;" "I would not want to talk more about it;" "we'd better not talk about it on the  
25 phone;" and "I don't want to tell you on the phone about our tactics and strategy;" These  
26 repeated references to the dangers of discussing defendant's case on the monitored  
27 phones demonstrates defendant and his father are fully aware of the fact that their  
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1 communications are not covered by any privilege. In fact, in one call on November 9,  
 2 2014, defendant's father specifically instructed defendant that "your conversations with  
 3 lawyers are confidential but the phone calls are not."

4 Defendant and his father's use of code words and other methods to obfuscate the  
 5 meaning of their conversations further demonstrate their awareness of the BOP telephone  
 6 monitoring. Defendant and his father frequently use coded language to disguise the  
 7 meaning of their conversations. As outlined in the government's initial response to  
 8 defendant's motion for bifurcated representation, defendant and his father use code words  
 9 such as "doctors" or "magicians" to refer to non-lawyers helping them in their efforts to  
 10 get defendant released and also refer to their plans using a variety of medical terms.  
 11 Occasionally, defendant's father's attempts to explain things using coded phrases are so  
 12 vague, even defendant cannot understand:

13	UM1:	Did you understand what I told you... Did you think about it?//
14	Roman:	No, I did not understand it.
15	UM1:	[Sighing]. Well... Oh.... Well, like, you are saying that you are taking 16 books from the library. Books in Russian language come from the library...
17	Roman:	And?
18	UM1:	Right... So... Well... Those are deceitful books there... You understand 19 it?
20	Roman:	[Silence]. I don't understand.
21	UM1:	Huh?
22	Roman:	I don't understand.
23	UM1:	Well, you have me, you have a girl that you love, your new wife, so to say.//
24	Operator:	<u>This call is from a Federal prison.</u> //
25	UM1:	Ok?
26	Roman:	And?
27	UM1:	And there are books.
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1	Roman:	Ok, there are [books]. Umm...
2	UM1:	And they are deceitful!
3	Roman:	Well, ok.
4	UM1:	Yes. One should not be trusting any books.
5	Roman:	Um-hum.
6	UM1:	You got it?
7	Roman:	No.
8	UM1:	Well, good! It's ok. [Laughing].
9	Roman:	[Laughing].
10	UM1:	Just sit there and think about it.
11	Roman:	[Laughing].
12	UM1:	Just sit there and think about it. It's good that you have not understood it...

13  
14 In other instances, including the conversation below from June 21, 2015, defendant has  
15 warned his father that using code language on the monitored calls is a violation of BOP  
16 policy – again demonstrating defendant's awareness of the rules governing his telephone  
17 use:

18	UM1:	Romochka [Roman]... Did you get that I will have to... Do you have any
19		friendly tongue twisters? Like some language...
20	Roman:	Listen, it is not allowed here. I have already told you!
21	UM1:	Yes, but in the childhood... Let's say in the childhood//
22	Roman:	It is not allowed. Don't! Don't!
23	UM1:	Um-hum. So, you think that they are so gifted there [i.e., that they would understand]?//
24	Roman:	I have [UI-overlapping; been through?] all this.
25	UM1:	Oh, yeah?
26	Roman:	I have seen instances... Yes.
27	UM1:	So, when they would start using a code [language], then//
28	Roman:	Yes!

1	UM1:	Um-hum. Ok. We will think about it.
2	Roman:	I don't want to lose the phone calls! They do it really fast in here.
3	UM1:	So, whatever they don't understand//
4	Roman:	Yes!//
5	UM1:	...they do not think of it as of some foreign language, but rather right away they... Right?
6	Roman:	Yes.
7	UM1:	I got it. So, even any children's game won't work?
8	Roman:	They won't.
9	UM1:	Um-hum. It's ok. Then//
10	Roman:	It is written here clearly.
11	UM1:	In the rules?
12	Roman:	Um-hum.
13	UM1:	Ok. I just... I'll find [the way]...

### C. Defendant and His Father Have Discussed Potential Witness Tampering

As early as November 2014, defendant and his father began discussing who might appear as witnesses against defendant at trial with defendant commenting “Did you understand who said bad things about me? All those lies.” After defendant named a particular witness and discussed ways to discredit the witness, defendant’s father stated he would “have a serious talk about it” and they agreed to talk later. Since that time, defendant and his father have discussed this same individual on several occasions and defendant’s father has made several comments that suggest he may be planning to tamper with this witness. For example, on November 9, 2014, defendant’s father stated that he had “been asking [defendant’s attorneys] for a week to send me the document. . . You understand what document I’m talking about. Regarding [name redacted]. I don’t want to talk about it on the phone.”

1 In February 2015, defendant's father again asked defendant about this witness and  
 2 what defendant knew about the witness. Upon confirming with defendant the identity of  
 3 the witness, defendant's father stated "Well . . . Nice. . . Ok, I got you. Something has  
 4 to be done about it . . . Well, I have some ideas about it. Ok . . ." Recently, on  
 5 September 2, 2015, defendant's father brought up the same potential witness again:

6 Valery:	Yes, look, is my understanding correct that on [name redacted] . . . ahh, she is a witness in the case?
7 Roman:	As far as I understand, yes.
8 Valery:	Uh-huh. I got you. I'm just trying to find out, because I was asked to 9 find out.
10 Roman:	Uh-huh.
11 Valery:	I think I will have a meeting with some people in a week. Hello?
12 Roman:	Yes.
13 Valery:	Yes, and I will talk.

14 Defendant's father has also discussed collecting information related to the witness on  
 15 behalf of other unknown individuals. The government has carefully reviewed these  
 16 communications and coordinated with law enforcement closely to ensure the safety of all  
 17 witnesses in this case.

18 **D. Defendant and His Father Have Discussed Plans to Pursue Unknown**  
 19 **Alternatives to Litigation.**

20 Defendant's father has repeatedly discussed plans to pursue options other than  
 21 litigation to secure defendant's release from prison. During a series of conversations  
 22 spanning almost the entire time defendant has been in custody, defendant's father has  
 23 outlined a strategy of pursuing three options roughly described as: 1) the legal battle in  
 24 court; 2) political negotiations, and; 3) what defendant's father has called "Uncle  
 25 Andrey's option." "Uncle Andrey's option" has caused the government some concern as  
 26 defendant and his father have been careful to avoid clearly indicating exactly what this  
 27 means. When discussing Uncle Andrey's option, defendant's father speaks in coded  
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1 phrases and short clipped sentences in an effort to obfuscate the meaning of his  
2 statements.

3 The BOP is concerned that defendant and his father may be discussing a potential  
4 escape attempt involving the exaggeration of defendant's medical impairments to secure  
5 an outside medical appointment. In several calls, defendant and his father have discussed  
6 the use of "unconventional treatment" in order to secure defendant's release and  
7 defendant's father has mentioned the use of "empty pills" or "full pills" during these  
8 conversations. For example, the following conversation took place on May 21, 2015:

9 Valery:	Yes, but... Yes, but the point is that, you know... I flew over to the "doctors" to whom I showed the "history of your health" [i.e., your "health records"]... Umm... I had a very strange conversation regarding the methods of the treatment... Umm... They say that... Well, you remember that I have been insisting that those guys had to be fired? Hello? Can you hear me?
13 Roman:	I can.
14 Valery:	So... Well, there was a reason why I've been insisting on it. After that, a very weird type of a "medical treatment" was suggested. Today, I met with the person who recommended those "doctors" to me and I said that this type of a "medical treatment" was suggested. And he was like, "No, this type of a "medical treatment..." I agree with you. This "medical treatment" itself is good, but the ways of the "treatment" are bad." So... I... To you... How should I put it for you? [Sighing]. I am flying over to those "doctors" again tomorrow. Hello?
19 Roman:	I hear you.
20 Valery:	So, they are insisting that you should be doing "yoga." Yourself.
21 Valery:	So, they are insisting that you should be doing "yoga." Yourself. Right...But there are more questions there than answers. So far, I have not been able to find answers to those questions. I am telling you what it looks like.
24 Roman:	I understand what you are saying.
25 Valery:	Hello? I am saying that this is a very bad way//
26 Roman:	I understand! I understand! I understand! It is a very bad way and looks like it is not working.

27 . . . .

1	Roman:	I need to know the process itself.
2	Operator:	<u>This call is from a Federal prison.</u>
3	Valery:	Exactly! They will come to you and tell you about the process itself.
4	Roman:	That's good.//
5	Valery:	However, I do not agree with it. You have to listen to it.
6	Roman:	Ok. So, you don't agree with them?//
7	Valery:	And then you have to tell me your opinion, because... I agree with them about the "treatment" itself, but I disagree about the methods of the "treatment."
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9	Roman:	I see.
10	Valery:	<b>These methods of the "treatment" include "empty pills." Remember that one - "empty pills." So, I do not agree with the "empty pills."</b>
11	Roman:	Ok.
12	Valery:	<b>You got it. Those "empty pills" are important.</b>
13	Roman:	I'll keep it in mind.//
14	Valery:	<b>Because I think that the pills should be "full." Look. There are two options there - "empty pills" and "full pills." So in this we had a lot of...</b>

In apparent recognition of the fact that this type of plan is either illegal or highly questionable at best, defendant immediately interrupted his father and commented “This should not be talked about at all. It is forbidden to be talking like this in here.” Shortly after this call took place, defendant also began demanding an outside medical appointment with a specialist. The government understands that defendant is continuing to pursue this request, which was originally denied, through an administrative appeal process.

As a result, the FDC is justifiably concerned that defendant may attempt to fabricate a medical emergency through the use of unapproved drugs or other substances. Based on these concerns, the FDC implemented additional security measures including limitations on defendant’s visits with guests. Defendant and his father’s reaction to these increased security measures have resulted in further concern. On August 20, 2015, when

1 defendant told his father that the suspicious nature of their conversations had resulted in  
 2 added security measures, defendant's father remarked "What can we discuss? Your  
 3 escape plan or what?"

### 4 **III. ARGUMENT**

5 Defendant has no reasonable expectation of privacy in his monitored jail  
 6 communications and attorney-client privilege does not apply to communications with his  
 7 father or anyone else other than his assigned counsel. Because the Court has found there  
 8 are no conditions or combination of conditions other than detention that will reasonably  
 9 assure defendant's appearance or the safety of the community, defendant is detained  
 10 pending trial. Defendants in pre-trial detention are subject to monitoring of their  
 11 communications to ensure the security and good order of the institution and to protect the  
 12 public. *See* BOP Program Statement § 540.100(a). As shown above, monitoring of  
 13 defendant's communications have demonstrated that he is both a risk to the security of  
 14 the institution and to the safety of the community, including potential trial witnesses.  
 15 There is nothing improper about the government's monitoring of his communications to  
 16 assist in protecting against these risks.

17 The Ninth Circuit has held that defendants have no reasonable expectation of  
 18 privacy in monitored telephone calls made from a prison. *See, e.g. United States v. Van*  
 19 *Poyck*, 77 F.3d 285, 290-291 (9th Cir. 1996). In *Van Poyck*, the prosecution team  
 20 obtained recorded calls from the Los Angeles Metropolitan Detention Center in which  
 21 defendant made incriminating statements that the prosecution team later successfully  
 22 offered as evidence at trial. *Id.* In rejecting defendant's argument that the calls should  
 23 have been suppressed, the court noted that "no prisoner should reasonably expect privacy  
 24 in his outbound telephone calls." *Id.* at 290. The Ninth Circuit additionally stated: "We  
 25 hold that *any* expectation of privacy in outbound calls from prison is not objectively  
 26 reasonable and that the Fourth Amendment is therefore not triggered. . . ." *Id.* at 291  
 27 (emphasis added). Likewise, in *United States v. Sababu*, 891 F.2d 1308, 1329 (7<sup>th</sup> Cir.  
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1 1989) the Seventh Circuit held that defendant had no reasonable expectation of privacy in  
2 her phone calls with a federal inmate because defendant had been a frequent visitor to the  
3 prison and was well aware of the security measures in place. *Id.* The court went on to  
4 note that the defendant's frequent use of coded language "demonstrated her awareness  
5 that there was no privacy to the conversations." *Id.* As shown above, defendant's  
6 frequent use of coded language in this case also demonstrates his awareness that his  
7 communications are not private. Defendant's claim that his calls should be unavailable to  
8 the prosecution team as opposed to the FDC security staff, does not distinguish his claim  
9 from those made in *Van Poyck* in any material respect.

10 The government, including the prosecution team, must have the ability to continue  
11 monitoring defendant's jail communications to be in a position to protect against any  
12 efforts by defendant or others to harm the integrity of these proceedings or jeopardize the  
13 safety of witnesses. In addition to the need to protect the security of the detention center,  
14 the government must be in a position to ensure the safety of witnesses and the integrity of  
15 the prosecution as a whole. As demonstrated by the subject of these current proceedings,  
16 defendant's communications have revealed information that the government was obliged  
17 to bring to the Court's attention to ensure the integrity of these proceedings and, notably,  
18 to protect defendant's right to effective representation of counsel. Defendant's calls have  
19 also revealed information that has assisted the government in protecting potential  
20 witnesses. Without the ability to monitor defendant's calls, the government would have  
21 had no means of detecting defendant and his father's interest in a potential witness.

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**IV. CONCLUSION**

For the foregoing reasons, defendant's request to prohibit the government from continuing to review defendant's monitored jail calls should be denied.

DATED this 5th day of October, 2015.

Respectfully submitted,

/s/ Norman M. Barbosa

NORMAN M. BARBOSA

Assistant United States Attorney

/s/ Seth Wilkinson

SETH WILKINSON

Assistant United States Attorney

**CERTIFICATE OF SERVICE**

I hereby certify that on October 5<sup>th</sup>, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the attorney of record for Defendant.

*s/ Jennifer J. Witt*

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